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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1530

MAURICE GOLDBERG, CLAIRE GOLDBERG, MAURICE GOLDBERG, as Custodian for MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG, under The New York Uniform Gifts to Minors Act, and MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trusts for the benefit of MARION GOLDBERG, BETTE GOLDBERG and JOYCE E. GOLDBERG,

Petitioners,

—against—

ARROW ELECTRONICS, INC., and STATE OF NEW YORK,

Respondents.

Brief of Respondent Arrow Electronics, Inc., in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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EUGENE H. NICKERSON
Attorney for Respondent
919 Third Avenue
New York, N. Y. 10022

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Preliminary Statement

Maurice Goldberg, members of his family, and trusts of which they are beneficiaries (collectively the "Goldbergs") seek certiorari to the United States Court of Appeals for the Second Circuit to review that Court's judgment dismissing their complaint for failure to state a claim upon which relief can be granted (Petition for Certiorari, Appendix A). The Goldbergs' complaint, pred-

icated upon 42 U.S.C. § 1983, sought a declaratory judgment that New York Business Corporation Law § 623 ("BCL § 623") (Petition for Certiorari, Appendix C) is unconstitutional as applied to corporate shareholders who, like petitioners, elect to dissent from a merger but fail to obtain an appraisal and payment for their shares because the proposed merger is abandoned prior to consummation.

Finding no state action in Arrow Electronics, Inc.'s ("Arrow") reliance on BCL § 623, the District Court for the Eastern District of New York dismissed the complaint. In addition, Chief Judge Mishler found that BCL § 623 was plainly constitutional as applied to petitioners, for, upon Arrow's abandonment of the proposed merger from which the Goldbergs had dissented, the statute restored them to their full rights as shareholders. (Petition for Certiorari, Appendix B at 18 *et seq.*)

The Court of Appeals affirmed, holding *per curiam* that the Goldbergs' due process claim was "palpably without merit"; that it did "not rise to constitutional dimension"; and noting that it had twice been rejected by the state courts of New York (Petition for Certiorari, Appendix A at 15-17).

Questions Presented

1. Is a shareholder deprived of procedural due process by a statutory scheme which becomes operative not merely on notice to him but at his instance and which provides for a full judicial hearing of all legal and equitable claims?

2. Is a shareholder deprived of substantive due process by a statutory scheme which provides that, (i) upon his

voluntary election to dissent from a proposed corporate transaction, he exchanges his shareholder rights for appraisal rights, but that, (ii) if the proposed corporate action is abandoned, he is restored to his full rights as a shareholder?

3. Does a complaint premised on 42 U.S.C. § 1983 allege a deprivation of rights "under color of law," when the conduct of the defendant—a private corporation—was only its exercise of its statutory right (i) to condition an offer to pay a dissenting shareholder for his stock upon the actual consummation of the corporate action from which he dissented and (ii) to abandon the proposed corporate action, thus depriving the dissenter of his appraisal rights but restoring him to his status as a shareholder?

Facts

(a) The proposed merger

Arrow is a New York corporation whose common stock is listed and traded on the American Stock Exchange (86a).* In the spring of 1972 the management of Arrow proposed to its stockholders that Arrow change its state of incorporation from New York to Delaware through its merger into a newly-created Delaware subsidiary of the same name. The merger agreement provided for its abandonment by Arrow or by the Delaware subsidiary—even after stockholder approval—at any time prior to its effective date, which was defined as the date that the merger agreement was filed with the Secretary of State of Delaware (86a-87a).

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* Page references are to the Appendix to the Record before the Second Circuit, certified to this Court by petitioners.

The merger was approved overwhelmingly by Arrow's shareholders; the Goldbergs—alone among some 1,500 shareholders of Arrow at the time—objected to the merger and filed a notice of election to invoke the appraisal rights accorded dissenting shareholders (23a, 88a).

(b) BCL § 623

BCL § 623 is a comprehensive statutory scheme governing the rights of shareholders of New York corporations who dissent from important corporate actions, such as mergers. It affords to dissenting shareholders who file timely objections the right to payment of the fair value of their shares as of the day before approval of the corporate action by shareholders (BCL § 623(h)(4))—but only if the transaction from which the dissent was taken is actually consummated.

Although it was seriously considering abandoning the merger, Arrow duly made an offer to purchase the Goldbergs' stock at a price of $9 per share, conditioning the offer, as § 623 expressly permits, on consummation of the merger (25a).

(c) The Goldbergs' state court applications

The Goldbergs did not agree to Arrow's conditional offer of $9 per share. Instead, they commenced a special proceeding in the New York Supreme Court pursuant to BCL § 623 to determine the value of their shares (25a). Arrow contended in opposition that the statute clearly prohibited payment for shares unless and until a merger was actually consummated. The court, noting that because of the financial burden payment for the Goldberg shares would entail, Arrow was seriously considering abandoning

the merger, denied the application (92a-93a). Shortly thereafter, Arrow abandoned the merger, reinstating the Goldbergs "to all [their] . . . rights as . . . shareholder[s] as of the filing of [their] . . . notice of election." (BCL § 623(e))

Not satisfied with this outcome, the Goldbergs appealed first to the Appellate Division of the Supreme Court and then to the New York Court of Appeals. Both appellate courts rejected their claims, including their contention that "BCL § 623, as construed by the Appellate Division, is unconstitutional." (*Goldberg* v. *Arrow Electronics, Inc.*, 42 App. Div. 2d 890 (1st Dep't 1973), *appeal dismissed*, 33 N.Y. 2d 1004, *leave to appeal denied*, 34 N.Y. 2d 515 (1974). Following the disposition by the New York Court of Appeals, the Goldbergs commenced this action under 42 U.S.C. § 1983.

ARGUMENT

I

The Court of Appeals decision that BCL § 623, as interpreted by the courts of New York and as applied to petitioners, did not deprive petitioners of due process is clearly correct.

As the Second Circuit held, the Goldbergs' constitutional claim—predicated on the line of procedural due process cases beginning with *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969)—is devoid of merit. First, insofar as *Sniadach* and its progeny may be thought to have any relevance to the circumstances here, these decisions support the validity of the § 623 statutory scheme.

Second, other authorities, more nearly in point, also establish that the statute, as applied, is a proper exercise of the state's authority. Finally, wholly apart from the precedents, the legislative scheme embodied in § 623 assures that dissenting shareholders are deprived of no substantive rights whatever, since, in the event of abandonment of a proposed merger, dissenters, such as the Goldbergs, are thereupon restored to their shareholder status.

(a) BCL § 623, as applied to petitioners, did not deprive them of procedural due process.

The Goldbergs contend that, when Arrow abandoned its proposed merger, § 623, as interpreted by the state courts, "denied [them] the right to claim damages for being deprived of their property . . . [and deprived] them of a forum in which to be heard with respect to their claims." (Petition for Certiorari, p. 11.) The Goldbergs' reliance upon *Sniadach* v. *Family Finance Corp., supra; Fuentes* v. *Shevin,* 407 U.S. 67 (1972), and similar cases to support this claim is plainly misplaced.

To begin with, each of the cases upon which petitioners rely concerned deprivations of property as a consequence of acts initiated by someone other than the complaining party. In each instance, the constitutional infirmity stemmed from the failure of the state statutory scheme to afford notice or hearing prior to seizure of the complainant's property. Moreover, even *Fuentes,* at its broadest reach, merely

> ". . . enunciated the principle that the constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible

> personal property, however brief the dispossession and however slight his monetary interest in the property." *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 623 (1974) (concurring opinion).

Here, unlike the circumstances in *Sniadach* and *Fuentes*, petitioners challenge the validity of a statutory scheme that they themselves voluntarily invoked to obtain a benefit—the right to an appraisal—not available to shareholders at common law.

In *Mitchell* v. *W. T. Grant Co., supra*, this Court upheld the validity of a Louisiana statute which enabled a mortgagee or lienor to sequester a debtor's property upon an *ex parte* application, because the statute

> . . . provide[d] for judicial control of the process from beginning to end. This control is one of the measures adopted by the state to minimize the risk that the *ex parte* procedure will lead to a wrongful taking. 416 U.S. at 616-17.

Here, in marked contrast even to the valid Louisiana statute, BCL § 623 is replete with provisions for plenary adversary hearings from beginning to end.

(b) BCL § 623, in fact, deprives petitioners of no substantive rights.

Petitioners' argument challenges § 623 upon substantive, as well as procedural, due process grounds. The claim seems to be that, upon abandonment by Arrow of the proposed corporate action from which plaintiffs elected to dissent, BCL § 623 neither afforded them the right to payment for their shares nor restored them to precisely the

position they had occupied prior to the time of their dissent.

A review of the statute discloses, however, that BCL § 623, as the Court of Appeals stated, "is a rational scheme for determining the rights of shareholders when they oppose a merger." (Petition for Certiorari, Appendix A at 16.) In fact, its provisions assure that dissenting shareholders are not subject to any deprivation of rights from the time they dissent until consummation or abandonment of the proposed corporate action.

First, in the event that the corporate action is consummated, BCL § 623 entitles a dissenter to payment of an amount equal to the value of his shares at the time the corporate action was approved by stockholders and, in most circumstances, interest as well. On the other hand, in the event the corporate action is abandoned prior to consummation, as happened here, § 623(e) provides that the dissenter "shall be reinstated to all his rights as a shareholder as of the filing of his notice of election [to dissent], including . . . any intervening dividend or other distribution. . . ."

Moreover, contrary to petitioners' assertions, dissenting shareholders are not prohibited—by reason of their dissent—from selling their shares prior to the consummation or abandonment of proposed corporate action. Section 623(f) specifically recognizes the right of dissenting shareholders to transfer their stock to others; the only qualification upon this right is the obviously necessary one that purchasers take subject to the benefits and burdens consequent upon the dissent itself.

In sum, petitioners have cited no cases demonstrating either that their claim presents a substantial constitutional

question meriting or necessitating this Court's resolution, or that the decision of the Court of Appeals, rejecting that claim as "palpably without merit," was not fully consonant with this Court's resolution of prior, similar (albeit patently more weighty) due process claims.

II

Petitioners' assertion that Arrow acted "under color of state law" (a) was not a basis for the decision below and (b) is without merit.

The Goldbergs' petition to this Court is also premised on the assertion that Arrow's actions giving rise to the allegations of the complaint were "under color of state law"; hence, the argument goes, the District Court's dismissal for failure to state a claim under 42 U.S.C. § 1983 was erroneous.

(a) The "state action" issue was not decided below.

Although the District Court dismissed the Goldbergs' complaint for failure to state a claim under 42 U.S.C. § 1983 because it did not find Arrow's actions, allegedly in derogation of the Goldbergs' constitutional rights, to have been performed under the requisite "color of state law" (*Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970)), the Court of Appeals declined to review that decision and, instead, based its decision rejecting the Goldbergs' due process claims solely on their lack of merit. Hence, assuming *arguendo* that the District Court's dismissal on state action grounds was in error, a reversal of that decision would merely entitle petitioners to a review on the merits —precisely what the Court of Appeals gave them.

(b) The District Court's opinion is consistent with those of this Court and does not warrant review.

It is clear, in any event, that the Goldbergs' reliance, in their "state action" argument, on this Court's decision in *Reitman* v. *Mulkey,* 387 U.S. 369 (1967), is misplaced. In asserting that *Reitman* stands for the proposition that the mere enactment by the legislature of BCL § 623, by permitting a corporation to abandon a proposed merger without compensation to dissenting shareholders, constitutes state encouragement of a private deprivation of rights amounting to state action under § 1983, petitioners have ignored this Court's admonition of more than a decade ago that the inquiry as to the applicability of § 1983 requires a "sifting [of] facts and weighing [of] circumstances" to determine the degree of significance of the state's involvement. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722 (1961). The District Court, on the other hand, explicitly relying on that test, concluded that BCL § 623, as applied to the facts at hand, did not have any significant bearing on the Goldbergs' rights as shareholders. (Petition for Certiorari, Appendix B at 22-23.)

Moreover, this Court's decision in *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974), handed down after the District Court's ruling, serves to confirm the soundness of Judge Mishler's analysis and to emphasize the absence of state action—for purposes of § 1983—in circumstances like those at hand.

In *Jackson,* plaintiff, suing under § 1983, sought relief against a privately owned and operated utility, contending that its termination of her electrical service, without prior notice and an opportunity to be heard, denied her due process. This Court, ruling that no state action was pres-

ent despite the fact that termination of service was pursuant to a tariff filed by the utility in accordance with state law, held as follows:

> Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.
>
> * * *
>
> All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated private utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utilities Commission found permissible under state law. Under our decisions this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for the purposes of the Fourteenth Amendment. 419 U.S. at 357-358.

Of course, unlike the utility in *Jackson,* Arrow is not subject to a pervasive regulatory scheme of the sort that governs electric companies; rather, New York's involvement in Arrow's activities differs not at all from the state's role in the affairs of any profit-making corporation that it charters. And here, contrary to the circumstances of any of the above cases, including those relied on by petitioners, it was not Arrow, the defendant, who sought the benefit of the statutory scheme about which petitioners now complain, but the Goldbergs themselves, who first chose to dissent and then elected to bring suit to enforce their

dissenters' rights. In these circumstances, and in light of this Court's opinion in *Jackson,* it verges upon the frivolous to argue that Arrow's actions pursuant to BCL § 623 constitute state action.

Conclusion

Petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

EUGENE H. NICKERSON
Attorney for Respondent

July 1, 1975